No. 3111.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES GYPSUM COMPANY,
a corporation,

Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY,
a corporation,

Appellee.

BRIEF FOR APPELLEE

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Filed May....., 1918.

.....Clerk.

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STATEMENT OF THE CASE.

This is an action for specific performance of an option contract to purchase certain property and property rights in Cascade County, Montana.

On the 15th day of June, 1909, the Mackey Wall Plaster Company entered into a lease with United States Gypsum Company (Trans. p. 56 et. seq.). The lease also contained an option to purchase, which is contained in Paragraph Thirteenth thereof (Trans. p. 72). By this option the Gypsum Company obtained the right to purchase "all the property and property rights herein described for the sum of Fifty Thousand Dollars ($50,000.00) . . . . ". The

"property and property rights herein described" are contained in Descriptions "a" and "b" of the agreement (Trans. pp. 60-61). Description "b" is as follows:

> "All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: Beginning at a point fifty (50) feet Northwesterly from and at right angles to the center line of the B. & M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the South line of Section Two (2), Township Twenty (20) North of Range Three (3), East; thence Northeasterly parallel to the said center line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company's line of railroad 220 feet; thence West at right angles 200 feet to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet, thence Easterly in a straight line 175 feet, to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and the said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked 'Exhibit Plant Lease.' ".

This agreement contained a provision for its extension and renewal, and by agreement dated July 1, 1910 (Trans. p. 15 et. seq.), the lease and option were extended for a period of five years; and by a still further agreement dated the 6th day of July, 1915 (Trans. p. 24), the agreements of June 15, 1909, and

July 1, 1910, were in all respects extended, renewed and made valid and of full force and effect for the further period of one year from July 6, 1915.

In this last extension a change is made in the mode of the exercise of the option.

> "And as a further consideration for said extension, lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the Lessor Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it will, at least sixty days prior to the first day of July, 1916, give the Lessors in writing a notice to the effect that Lessee will not purchase the said property under and by virtue of said agreements; and it is agreed that if Lessee shall neglect or fail to give such notice at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, . . . ".

It is admitted by the pleadings (Trans. p. 36) that United States Gypsum Company took possession of the property so leased and enjoyed the use thereof during the term of said lease, and that it paid all the rents and did all the things required by it to be done in accordance with the terms thereof, and that it continued to occupy said premises during the term of the extensions of said lease and performed all the terms and conditions of said agreement throughout the period of said extensions.

The appellee, taking the position that the option had been exercised by appellant by failure to give the notice referred to in the agreement of July 6, 1915, upon July 5, 1916, sent to the appellant deeds

of conveyance to the property described in the agreements, which were received by appellant and returned, the appellant declining to accept the deeds and assignment for the reason that it had not purchased the property (Trans. p. 104). Thereupon this action was instituted.

The appellant takes the position that it never exercised the option; first, because of its letter dated April 19, 1916; and second, because the giving of notice of non-acceptance was waived by the conduct of appellee or that he has estopped himself to assert that such notice was never given.

Appellant further makes the contention that even if the option were exercised, the court should not compel specific performance of this agreement for the reason that appellee cannot give satisfactory title to a part of the premises agreed to be conveyed, since a portion of said premises were held under a lease from Great Northern Railway Company to the Mackey Wall Plaster Company (Trans. p. 79), which lease contains the usual provision against assignment or sub-letting without the consent of lessor (Trans. p. 82) and that no satisfactory consent had been made by the Great Northern Railway Company.

ARGUMENT.

I.

The Option Was Exercised.

The method of exercising the option as contained in the agreement dated July 6, 1915 (Trans. p. 25), is unique. It places the burden upon the appellant to give appellee a notice in writing at least sixty days before July 1, 1916, if it does not avail itself of the option, and if it shall neglect or fail to give such notice at least sixty days before the 1st of July, 1916, it will thereby become obligated to make such purchase. The terms of this option were clearly understood by the parties thereto as is further evidenced by the letter dated July 14, 1915 (Trans. p. 28), whereby the Mackey Wall Plaster Company makes clear to the United States Gypsum Company "that in case you fail to notify us of your election not to purchase on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties . . . "; and such letter further provides that the notice contemplated "shall be sufficient if deposited in the United States mails, postage prepaid, enclosed in an envelope addressed to either of us at the City of Great Falls, County of Cascade, State of Montana."

There is no effort upon the part of the appellant to make out a case of surprise or mistake. The evi-

dence is too plain that the officers of appellant at all times had clearly in mind the peculiar form of this option and the form of the notice that was required to be given if they should determine not to buy the property.

Upon April 19, 1916, Mr. Knode, appellant's manager, wrote a letter to Mr. A. D. Mackey, the president of appellee, at Minneapolis, Minnesota, wherein it is stated, "Expect to give you formal notice on May 5th that we do not care to purchase your property." (Trans. p. 94). Mr. Mackey testified that on April 28th in a conversation between himself and Mr. Knode, the manager of operation for appellant, the latter said: "Well, Mr. Mackey, on May 5th, or May 4th, whichever date it may be, we will send you our formal notice that we do not care to purchase your property." (Trans. p. 99.)

Bearing in mind, therefore, that although the wording of this option is unique, and although by the provisions of the agreement, the option is automatically exercised by the failure to give a written notice, there is no hardship in holding appellant to the terms of the contract when those terms were so clearly remembered by the officers of appellant at all times prior to the exercise of this option.

The only letter or writing relating to the exercise of this option which was written prior to the time fixed, is the letter of April 19, 1916, hereinbefore referred to. Appellant makes some contention that this is a notice of its election not to purchase as contemplated by the option. It is plain from the terms of the letter

itself that it was never intended to serve any such purpose. We are well aware of the rule that mere informality does not vitiate a notice where no particular form is necessary, but the objection to this letter goes not to its form but to its substance. By placing at the end of the letter the clause, "expect to give you formal notice on May 5th that we do not care to purchase your property," the appellant deliberately robbed it of any binding effect which it might otherwise have had as a notice of intention not to purchase.

In order that the effect of a written instrument upon the parties may be fully understood, it is frequently necessary to look into the circumstances surrounding its execution and the motives of the persons who make it. At the time of writing this letter, appellant had been in possession of these mining properties and the mill at Great Falls for about seven years. They had continued on, renewing the lease from time to time; and it is to be gathered from the testimony of Messrs. Knode and Nold, and is a fair assumption, that appellant had built up a steady business in the operation of these properties throughout that time. The writer of the letter of April 19th had two things in mind: he wanted if possible to obtain an extension of the lease substantially as it then existed, but at the same time did not wish to surrender any right to purchase which appellant then had in the property; he wished to induce Mr. Mackey to come to Chicago "to talk the matter over," and he wished also to hold over Mr. Mackey as a sort of threat that the appellant expected to ultimately give notice that it would

not purchase these properties. Mr. Knode testified: "My purpose in writing that letter was to get Mr. Mackey down to Chicago if he cared to come. I surmised that after the receipt of that letter Mr. Mackey would care to come to Chicago." (Trans. p. 145). And with reference to his understanding when the letter was received, Mr. Mackey says: "I smiled when I got that letter and said to myself, 'Well, that is pretty smooth.' I meant by being pretty smooth, that they had not said anything and they were left in a position to do or not do, as they might later on determine." (Trans. p. 117.)

Appellant does not now seriously contend that this letter was any kind of a notice contemplated by these contracts, but more seriously urges that by his conduct after receipt of the letter, Mr. Mackey waived the giving of written notice.

We do not take any exception to the statement of the rules relating to waiver and estoppel cited in appellant's brief, but it is respectfully submitted that the evidence in this case wholly fails to sustain appellant's contention that any such waiver or estoppel existed.

The letter of April 19th accomplished its purpose. Mr. Mackey went to Chicago, and the conversation was had between Mr. Mackey, and Mr. Knode, and Mr. Nold, who was an officer of the appellant. The testimony of all the witnesses indicates that the conversation was largely directed to the condition of the mine. It is very apparent that the officers of the Gypsum Company made every effort to belittle the quantity of gypsum contained in the Mackey mine and greatly

magnified the appellant's pretended reasons for its supposed desire not to purchase appellee's property. Mr. Mackey denies that Mr. Knode told him that appellant would not purchase the property, but states both on direct and cross-examination that the conversation was as follows: "'Well, Mr. Mackey,' he said, 'On May 5th, or May 4th, whichever date it may be,' he says, 'we will send you our formal notice that we do not care to purchase your property.' I said, 'Well, whatever you folks decide to do, you may send to me care of Mr. Ransom Cooper.' He turned his chair to the left, opened a drawer or something,—it might not have been to his desk, but he took out of it a good-sized memorandum pad and he commenced doing some writing; as he finished his writing he said aloud 'Care of Ransom Cooper,' put his pad where he got it, turned his chair around facing me . . ". " . . That was the only time that Mr. Knode said that they would not purchase the property." (Trans. pp. 99 and 111.)

As we understand the law relating to waiver or estoppel, it must appear from the language or conduct of the party estopped that he did or said something reasonably calculated to lead the other party to believe that the particular act—in this case, the giving of the notice—could be dispensed with. Did Mr. Mackey say to appellant's officers, "It will be unnecessary for you to give me any written notice that you will not purchase," or did he do any act which would lead appellant to believe that such was his frame of mind? We have closely searched the record both in the testimony of Mr. Mackey and in the testimony of Mr.

Knode and Mr. Nold, but we find it wholly wanting in any evidence of that sort.

Much stress is laid by appellant upon the fact that there were some negotiations for the extension of the lease. When the record is examined, however, as to the extent of these negotiations, it is plain that Mr. Knode made no definite proposition even as to a lease, and it is also perfectly apparent that Mr. Mackey did nothing more than listen; and when the discussion relating to the lease had ended, Mr. Mackey said: "Put in writing whatever you folks have in your mind and send it to Mr. Cooper." (Trans. p. 114.) Mr. Mackey also testified on cross-examination, "When we were discussing the making of a new lease, I had no means of knowing what they had in mind. I was in the dark. They had a right to send that notice or they had a right not to. It was not a fact that when I left the office of the Gypsum Company, I was aware that the defendant had decided not to buy my property, if that had been their position." (Trans. p. 116). All that Mackey said or did, no matter what version of this interview is accepted, amounted to this: "Whatever you people determine to do, put it in writing." There was nothing in this to indicate that Mackey had any reason to suppose that formal notice would not follow if appellant continued in the attitude which it assumed in the letter of April 19th, and there was nothing in Mackey's attitude or statements that was calculated to lull the appellant to sleep upon any of its rights.

This situation is clearly disclosed by appellant's

letter of May 11th. This letter is a remarkable piece of workmanship and as a bold attempt at a deliberate self-serving declaration, it is entitled to high rank. (Trans. p. 136). This is the first letter that was written on either side after the conversations of April 28th, and reads as follows:

> "We wrote you on April 19th last that we would not purchase the property under the agreements made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreements.
>
> "With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operations at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein.
>
> "We are willing, however, to enter into an extension of these contracts, whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty days' written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore."

According to Mr. Knode's testimony, when Mr. Mackey left Chicago, he was fully convinced that he had received all the notice he was entitled to. What purpose then could it possibly serve appellant to make

the lengthy recitals in the first part of this letter? If they had told Mr. Mackey that they were unwilling to purchase the property, why did they repeat in the second paragraph of this letter, "We wish to say that . . . we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein"? The first paragraph is an apparent effort to reconstruct the letter of April 19th and rechristen it a notice and make it perform the office of the formal and actual notice, which it promised. The letter of April 19th must be restated and made nunc pro tunc as of May 11th, to reach back as of April 19th and perform the office which on May 11th it was recognized it must have in order to be effective as a notice.

This sort of ledgerdemain finds scant favor in a court of equity. Waiver must have a substantial basis. There must be reliance on one side and acts to induce reliance on the other in order to constitute a waiver. This is entirely wanting. By the contract and by the letter of April 19th, appellee was entitled to expect a formal written notice if apellant did not wish to purchase the property. Mr. Mackey did nothing and said nothing during the entire conversation which would induce appellant to believe that he was not still expecting and entitled to this formal notice, and until such notice was given, appellee was bound by the option and contract and would clearly not have been warranted in entering into negotiations with any other person for the sale or disposal of the premises.

There are a few minor disputes in the testimony, but

as we view it, these are unimportant, and at all events have been resolved in favor of appellee by the Honorable Judge of the District Court who had the witness before him and carefully considered the testimony given.

By this letter and by these negotiations, appellant's officer was clearly and unequivocally maneuvering for a further advantage, using every means real and imaginary which could be devised to obtain it. This inference is clearly shown by the sequel for the evidence shows that after the appellant was put in a position where it is required to take this property at somewhere near its reasonable value, it then attempted to sell out Mr. Mackey's one hundred and ninety-eight shares taken one year before as security for $8000.00 at the insignificant sum of $99.00. (Trans. p. 149).

If it be true that appellant, after the time had gone by, did not wish to purchase these properties according to the terms of the option, and by mistake failed to give the proper notice, we can only say that this mistake was not induced by any language or conduct on the part of appellee or its officers or agents, and that it is no hardship upon appellant to take these properties according to the terms of the written agreements.

II.

The only other objections of appellant to the decree in this cause are based upon the alleged want of consent on the part of the Great Northen Railway Company to the assignment of the lease covering the property hereinbefore specifically described.

The lease was attached to and made a part of the original agreement (Trans. p. 79) and contains the following provisions against assignment and subletting:

> "The Lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the Lessor, its successors or assigns thereto."

We took the position in the court below, and it is now our contention that the Mackey Wall Plaster Company never agreed to assign this lease, in the usual form of such assignments or conveyances. The agreement in the option was to sell "all the property and property rights herein described for the sum of FIFTY Thousand Dollars ($50,000.00)." Description "b" covers "All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: "(Here is a description by metes and bounds) "being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked 'Exhibit Plant Lease.'"

This contract contemplated that the Plaster Com-

pany would convey said property rights and that upon making such a conveyance, its obligations would cease. The attitude of the Plaster Company as evidenced by this contract was this: "You are to take all my rights, titles, interests, and estates in these various properties just as they stand and we will give you a warranty deed warranting that the Plaster Company has not conveyed any estate or interest in said property or created therein any property rights in favor of any other person than said Gypsum Company, etc." The lease was attached at that time. The Gypsum Company knew all the provisions in the lease and the Gypsum Company took upon itself the burden of obtaining the consent of the Great Northern Railway Company to the sub-leasing and subsequent assignment of this lease.

This interpretation of the contract is clearly sustained by the subsequent events. The Gypsum Company went into possession of the properties and continuously occupied and operated the same for over seven years before the commencement of this action. It is admitted that they performed all of the terms and conditions of the agreement, and that they paid to the Great Northern Railway Company the rental which became due under the lease throughout the entire period.

The evidence discloses that when the United States Gypsum Company and Mackey Wall Plaster Company entered into the agreement dated June 15, 1909, Messrs. Veazey and Veazey, Attorneys at Law, at Great Falls, Montana, acted as attorneys for the United States

Gypsum Company in preparing that lease and option; that a week before the original agreement was executed, Mr. Veazey prepared the consent of the Great Northern Railway Company to the sub-leasing of these premises and the subsequent assignment thereof (Trans. p. 194), and that he forwarded the consent in duplicate to the General Traffic Manager of the Great Northern Railway Company at St. Paul, Minnesota, accompanied by a letter dated June 8, 1909, which reads as follows:

> "Referring to the subject discussed in your letter of May 28th, addressed to Mr. Kenney, with which you enclosed copy of letter addressed to you, under the date of May 26th, by Mr. S. L. Avery, President U. S. Gypsum Company, and copy of your reply (Which said correspondence you asked to have brought to my attention, through Mr. Jackson) we herewith enclose written consent by the Railway Company to the sub-leasing and subsequent assignment of the lease from the Railway Company to the Plaster Company, and would ask that you kindly have this paper immediately executed on behalf of the Railway Company, and forward to Mr. S. L. Avery at Chicago, advising us of your having done so and, as Mr. Mackey may feel that he should have a similar instrument in the files of his company, we send the consent in duplicate and would ask if agreeable, you will have each of these instruments signed on behalf of the Railway Company and the other sent to the Mackey Wall Plaster Company at Great Falls."

The consent was duly executed in duplicate by the Railway Company and one copy thereof returned to Messrs. Veazey & Veazey, and received by them a day or two before the execution of the original agreement (Trans. p. 196). It was sent back together with the

letter dated June 12, 1909, from W. W. Broughton, General Traffic Manager of the Great Northern Railway Company, which reads as follows:

> "Referring to your letter of the 8th, file 320, enclosing consent of the railway company to the subleasing and subsequent assignment of lease from the railway company to the U. S. Gypsum Company.
>
> "I enclose, herewith, copy of this document duly executed by the Great Northern Railway and have sent the other copy of the same to Mr. Avery, President of the Gypsum Company, at Chicago."

These transactions show beyond any doubt that the appellant accepted the construction of the contract, which we contend is the proper one, that is: that the burden of securing the consent of the Great Northern Railway Company was at all times upon the Gypsum Company, and realizing this from the nature of the instrument itself, the attorneys for the Gypsum Company refused to have the agreement signed at all until that consent had been secured. Bearing in mind also that the Gypsum Company immediately went into possession of the premises without making any further requirements of Mackey Wall Plaster Company for any consent to the sub-leasing of the premises or the subsequent sale, and continued to occupy the same and pay rent, and that later when the tender of the deed and assignment was made to them, they made no objection upon the ground that the consent of the Railway Company had not been obtained, or upon any other ground except that the option had not been exercised, the conclusion is irresistible that the Gypsum Company at all times recognized that the burden was upon it to secure the consent of the Great Northern Railway

Company and to maintain the conditions of the lease.

At the time we made this contention before the District Court (Trans. p. 172), we had not introduced the evidence of the actual procurement of the consent of the Great Northern Railway Company by the Gypsum Company, and the court, exercising an abundance of precaution, required proof of such consent before entering the decree. This is complained of by the appellant as fatal error.

The court, by the opinion of July 27, 1917 (Trans. p. 201), allowed appellee thirty days within which to secure the consent of the Railway Company or a discharge of the covenant. Within the thirty days, the consent was obtained from the files of Messrs. Veazey & Veazey (Trans. p. 198) and deposited in court. Thereupon the appellant raised objections to the sufficiency of this consent, and appellee was allowed thirty days to show that the consent was binding upon the Railway Company. Upon October 3rd the showing was made in open court upon the depositions of Mr. L. E. Katzenbach and Mr. R. I. Farrington, and upon the oral testimony of Messrs. R. J. Reynolds and W. H. Hoover. The appellant further complains that the depositions referred to should not have been admitted in evidence, and that objections to certain evidence should have been sustained.

Directing our attention first to the contention that the court erred in allowing appellee to prove the consent of the Great Northern Railway Company as a condition precedent to the entering of the decree, it is the position of appellant that the contract could not be

specifically enforced because it lacked mutuality of remedy at the outset. In view of the proof introduced and now of record in this case, this contention is entirely out of place because the proof conclusively shows that this consent was given by the Railway Company and obtained by the United States Gypsum Company prior to the signing of the original contract, so that even if mutuality of remedy at the time of the entering into of the contract should be required under the most stringent rules ever announced by the courts, this contract would fully meet the requirements of such a rule. However, counsel for appellant err in the contention that at this late date mutuality of remedy is necessary at any time before the entry of the decree in a case such as the one at bar. Mr. Pomeroy in Vol. II. Equitable Remedies, says:

"§769. The frequent statement of the rule of mutuality—'that the contract to be specifically enforced must as a general rule, be mutual,—that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,' is open to so many exceptions that it is of little value as a rule."

"§772. (c) Where Plaintiff's Inability is Cured Before Decree.—A clear instance of this sort is the inability of the plaintiff to make a title, because the title is in another. The defendant may have known this at the time of the bargain. Equity will not compel him to perform before the title is in, but should the plaintiff get in the title before the decree, defendant must perform."

"§808. It is a familiar application of the principle as to performance by the plaintiff, that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the

subject matter. Where, however, the vendor gets in the title before the decree, 'the doctrine of equity is, when time is not of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of decree, unless there has been bad faith, or an improper speculation attempted.' The weight of authority supports this rule, although there are several jurisdictions which hold that if the plaintiff could not make a good title at the time of the agreement, specific performance will be denied him on the ground of lack of mutuality. These latter cases are inconsistent with the view of the mutuality rule that is best supported by authority and on principle; since at the time of the decree the defendant is not left in any inequitable position."

"Where two parties agree to exchange lands, each agreeing to furnish good title satisfactory to both parties, but without any mention in such agreement of mortgages with which each property is incumbered, a decree for specific performance may be granted at the suit of one party notwithstanding the complaint of the other party that the one seeking to enforce the contract is unable to clear off his mortgage and give good title."

Oakey vs. Cook
41 N. J. Equity 350
7 Atl. 495.

"The authorities are, therefore, ample to establish the doctrine that the mere fact that the vendor's property is incumbered, or his title is defective, at the time the contract of sale is made, will not prevent his enforcing the contract in equity if he has removed the incumbrance, and perfected the title by the time he is required by his contract to convey it; and, generally, when he has acted in good faith, relief will be granted him, if he is ready to furnish a clear title at the time of the decree, provided the delay has not prejudiced the purchaser, and time is not the essence of the contract. If this were not so, an owner of land who has incumbrances upon

it might pay them off for the purpose of giving the purchaser a clear title, and then not be able to enforce the contract of purchase; or he might be subjected to heavy costs in order to have his title cleared, and then not be able to require the purchaser to perform his part of the contract."

Maryland Construction Co. vs. Kuper,
90 Md. 529
45 Atl. 197.

"Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfil the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able, in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

Dresel vs. Jordan
104 Mass. 407 o. p. 414.

"Even equity may enforce the specific performance of a contract, for a sale of land, although the vendor has no title at the time of the sale or even at the time of filing the fill, so as he can make a good title at the time of the decree. The purchaser ought not to complain if he gets that for which he contracted, and in as good a condition as he had a right to expect."

Mason vs. Caldwell
5 Gilman 196
48 Am. Dec. 330, o. p. 335.

"The complainant had a right to file his bill to compel the defendant to complete his contract, or to have it rescinded and to have the purchase-money restored. By his answer, the defendant consents

and offers to execute the contract; and although he was not then in a situation to give a good title, yet, from the subsequent release from Deponceau, and the deed from Brunson and wife, which were exhibited on the hearing, it is probable that he can now give a good title to the land selected and agreed upon between him and the agent of the complainant in 1824. The complainant is not bound, however, to take that title until it has been examined and passed upon by a master. If the defendant can give a good title, the complanant must now accept of it, together with an equitable compensation for the delay; . . . ."

Pierce vs. Nichols
1 Paige, 244.

"The court will not decree a specific performance where the vendor cannot make a clear and undoubted title to the premises, unless the purchase has been made at the risk of the vendee as to the title, or the latter has agreed to accept such title as the vendor was able to give. In general, however, it is not necessary for the complainant to show that he was able to give a good title at the time of making the agreement to sell, or even at the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree, or at the time when the master makes his report. (Langford v. Pitt, 1 P. Wms. 630; Clute v. Robinson, 2 John. Rep. 595, Coffin v. Cooper, 14 Ves. 205.)"

Brown vs. Haff
5 Paige 234, o. p. 240.

"It is not a matter of course, however, to dismiss a bill for specific performance merely because the title was not perfect at the commencement of the suit; although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. A specific performance may be decreed, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, un-

less the purchaser has been materially injured by the delay."

Dutch Church in Garden St. vs. Mott
7 Paige, 77, o. p. 85.

"The defendant concedes that there are precedents where a decree has been made on terms allowing a vendor to remove mortgages from the property (Oakey v. Cook, 41 N. J. Eq. 350, 7 Atl. 495), and where the vendor has perfected his title before bill filed, or before the hearing, or before the decree, or even after that time, when the vendor held a contract entitling him to such outstanding interest (Soper v. Kipp, 5 N. J. Eq. 383), but it is contended that no cases can be found where additional time has been decreed to afford an opportunity to acquire an outstanding title over which the vendor had no control. When the vendor in a suit for specific performance, by reason of the silence or the conduct of the vendee, regarding the title to be conveyed, during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before decree, this opportunity will still be afforded to him by the allowance of a reasonable time even after the entry of the decree, if it can be done without hardship to the vendee.

"It is apparent that, by reason of the defendant's delay in not bringing forth her objection until the very day of the hearing, an equity has arisen in favor of the complainant that he be not deprived of the period of time which he would have had under the ordinary rules, and therefore we are constrained to hold that the allowance of thirty days after the making of the decree within which to obtain a release for the alleged outstanding interest is not inequitable, and does not work hardship upon the defendant."

Van Riper vs. Wickersham (N. J.)
76 Atl. 1020
30 L. R. A. (N. S.) 25, o. p. 30.

A contract for the sale of land will be specifically enforced although the consent of a third person not

a party to the contract is required to perfect the title where it appears that such consent has been secured after the filing of the bill. (Rice vs. Theimer (Okla.) 146 Pac. 702).

It has very recently been held by the Circuit Court of Appeals for the Fifth Circuit that even where the obligations of the plaintiff under the contract sought to be enforced call for a continued operation and through a term of years of an electrical power plant involving the rendition of skilled personal services and the outlay of considerable sums of money, yet the court will grant specific performance of a contract against the other party where the decree can adequately insure performance on plaintiff's part also. (Montgomery Traction Company vs. Montgomery L. & W. P. Co. 229 Fed. 672).

The same principle has long been recognized in that class of cases where it is held that the existence of an incumbrance on land contracted to be sold does not defeat specific performance of the contract where by the decree the purchaser can be protected by deduction in the purchase price to pay off the incumbrance. (Guild vs. Atchison, Topeka & Santa Fe Railway Co. (Kans.) 45 Pac. 82).

The court therefore did not err in making its decree conditional upon the procuring of the consent of the Great Northern Railway Company, especially in view of the fact that the objection was raised for the first time at the hearing of the case, and that appellee had every reasonable ground to suppose that the burden

had at all times been upon the appellant to procure this consent.

By the earnestness of appellant's argument before the District Court, the court, in order to make sure that an injustice should not be done, required appellee to show the consent of the Great Northern Railway Company to this assignment. When the consent was proposed, appellant made technical objections to it upon the grounds that it did not show upon its face the authority of the officer to execute it, and that it was undated, and had not the seal of the corporation affixed. These objections were and are of the most trival character, but the court required proof of the authenticity of this consent and consequently it became necessary for appellee to introduce testimony showing the execution of the consent and the authority of the officer to execute it. To do this, two depositions were taken and offered in evidence upon October 3rd. The appellant contends that their admission in evidence was erroneous for the reason that they were not taken in compliance with Rule 47 of the Equity Rules for the United States courts.

We respectfully call the attention of the court to the application for permission to take depositions (Trans. p. 213), the affidavit of W. H. Hoover in support thereof on page 210, and the order of the court permitting the taking of depositions on page 214, and the notice of taking depositions on page 209. Litigants would certainly be in a very embarrassing situation in the United States courts if depositions could never be used in evidence except those filed by the plaintiff

within sixty days from the time the cause is at issue, and those of the defendant within thirty days thereafter. The rule was never designed to be exclusive and it clearly states, although that portion seems to be omitted from the rule as quoted in appellant's brief: "All depositions taken under a statute or under any such order of the court shall be taken and filed as follows, *unless otherwise ordered by the court or judge for good cause shown*: those of the plaintiff within sixty days, etc." The record of the case is entirely adequate to show the good cause required by the rule for the taking of the depositions and filing them after the original hearing. No necessity had theretofore arisen for the introduction of the evidence sought by the depositions. This is all clearly shown by the affidavit of W. H. Hoover, and by the record.

We also call attention of the court to Rule No. 56, which was substantially complied with in every respect.

The objection was not well taken for a still further reason. The rules of court are in no way a limitation on Section 863, U. S. R. S., which provides that "the testimony of any witness may be taken in any civil case depending in a district or circuit court by deposition . . . when the witness lives at a greater distance from the place of trial than one hundred miles . . . ". The taking of the depositions in all respects complied with the statute and there is no objection made that they did not. The statute having been complied with even if the equity rule were not strictly followed, the depositions would be properly admissible.

The most recent case upon the question that we have

been able to find is Iowa Washing Machine Company vs. Montgomery-Ward & Company, in the Southern District of New York, 227 Fed. 1004. On page 1007 the court says:

> "Finally, I am asked to pass upon the question of practice in respect of which it is said the members of the Bar are somewhat in doubt. The defendant objected to the admission in evidence of certain depositions taken by plaintiff without first obtaining leave of the court. These depositions were taken under Section 863, R. S. U. S., and apparently within the time provided by Equity Rule 47, but without an order of court. I am of opinion that Equity Rule 47 was not intended to vary or be a limitation upon Section 863, because, of course, that section being Legislative enactment, cannot be changed except by further Legislative enactment."

The depositions, both under the Equity Rules and under the statute, were properly admissible, and they were adequate to prove the execution of this consent by Robert I. Farrington while he was Second Vice-President of the Great Northern Railway Company. While he does not state at what date he signed this consent, he does state that it was while he was Second Vice-President of the Great Northern Railway Company, and the date is supplied by the testimony of Mr. Reynolds, which shows that it was signed on or about the 12th day of June, A. D. 1909, and at all events, prior to June 15th, the time of the execution of the contract (Trans. p. 196). By the deposition of L. E. Katzenbach, the present Secretary and Treasurer of the Great Northern Railway Company, it was proved that Mr. Robert I. Farrington was the duly elected and acting Second Vice-President of the Great Northern

Railway Company from December 30, 1901, to October 15, 1909, and that he was Vice-President thereafter and until December, 1912 (Trans. p. 188). This was proved by the original minute books of the corporation.

No objection was made at the time of the examination of Mr. Katzenbach, although Mr. MacLeish, the attorney for the appellant, was present throughout the examination and cross-examined the witness. However, when the deposition was introduced at the hearing, objection was made that the records were not shown to have been correctly kept and that they were not identified (Trans. p. 187). This objection was clearly waived by not taking it at the time of the examination of the witness. Appellant then had an opportunity to object, and if he had objected, any such technical objection could then have been cleared up by the testimony of the witness. The objection, however, is not well taken even if it be considered as properly interposed.

Mr. Katzenbach testified that all the minutes from which he read are contained in an official minute book of the Company and that it is a part of his duties as Secretary and Treasurer of the Company to have the custody and control of these books; that the minutes of all of the meetings referred to are attested by the Secretary or Assistant Secretary of the Company (Trans. p. 192).

> "Corporate books and minutes may be identified by having an officer swear that he is the proper custodian and that they are the original books. (Cook on Corporations, Sections 714 and 753)."
>
> Lowry National Bank vs. Fickett
> 22 Ga. 489.

In the case of Tarbell & Whitham vs. Gifford (Vt.) 72 Atl. 921, the constitution of a society was admitted in evidence upon proof that it was found and kept in the archives of the society and acted under as a constitution, and the minute book of the society was authenticated by proving that it was the book in which the society kept the record of its meetings.

In the case of Gold Glen Mining, Milling & Tunnelling Company vs. Daniels (Colo.) 121 Pac. 677, it was held that the mere production in court by the corporation of a book purporting to be its minute book is sufficient identification of the minutes to warrant their introduction in evidence where they are not being offered to support the case of the corporation.

Section 3902, Revised Codes, 1907, of the State of Montana provides:

> "All corporations for profit are required to keep a record of all their business transactions, a journal of all meetings of their Directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done . . . ".

We assume that Minnesota has a similar law and are entitled to indulge the presumption that the duty enjoined by the statute was properly carried out.

Proof almost identical with that offered in the principal case was held sufficient in the case of American Trust Company of San Francisco vs. Dickinson (Cal.) 157 Pac. 615, o. p. 618.

The following cases give ample support to those cited:

State Loan Association vs. Moore (Del.) 55 Atl. 946

Schubert Lodge No. 18 K. of P. vs. Schubert K. U. Verein (N. J.) 38 Atl. 347

Smith vs. Moore, 199 Fed. 697.

The by-laws were admitted without objection (Trans. p. 190) and show the authority of the Second Vice-President to execute this consent. Mr. Farrington himself testified that he was Second Vice-President throughout the entire period and throughout the month of June, 1909, and that he signed the consent in his capacity as Second Vice-President while acting for the Great Northern Railway Company. This evidence alone is sufficient.

Even after the introduction of this proof, appellants are still contending that the title which the decree compels them to take is not a merchantable title. They return as if in a spirit of despair to the insufficiency of the consent. But by their repeated insistence upon this insufficiency, they have finally placed themselves in a position where there is no escape from the conclusion that they have had this consent from the time dating before the original execution of this contract; and if they now seek to complain that this is not a sufficient consent, they have only themselves to blame because it was their consent, prepared by their attorney, forwarded at the request of their President, and signed and returned at his request. The copy which is now on file in court is but a duplicate copy, and according to the letters passing between Mr. Veazey and the Great Northern Railway Company, the other duplicate copy

has at all times been in the possession of the United States Gypsum Company itself.

This attitude is in keeping with the attitude of this appellant throughout the proceedings leading up to this litigaion and at all times since. If there were any merit in this contention that the Great Northern Railway Company did not consent to the assignment of the lease, every opportunity was afforded to the appellant to attack the assignment and introduce evidence to that effect. A consent once given need not be reaffirmed. A new consent cannot properly be asked for. Since the Railway Company has once given its consent to the sub-leasing of the premises and the subsequent assignment of the lease, that consent stands and it cannot be made stronger or more effective by any further writing.

The evidence taken altogether makes it apparent that the District Court required more than was necessary of the appellee when it required the production of the consent of the Great Northern Railway Company, and the subsequent proof made apparent that our contention with reference to the interpretation of the contract, to-wit: that the burden was upon the Gypsum Company to obtain the consent, and in all else comply with the lease with the Great Northern Railway Company, was the interpretation which the parties had adopted and was the correct one. While this might furnish grounds for the appellee to complain, it certainly does not help appellant's case.

Counsel for appellant call the attention of the court to the fact that the decree provides interest from July

6th, the time when the contract should have been performed. As the proof subsequently showed, appellee was able and willing to give and did actually tender a good and sufficient conveyance and title to the appellant on July 6th, and taking the position that the appellant was wrong in refusing to carry out the contract at that time, equity cannot do justice in any other way than by placing appellee in the same position it would have been in had the contract been executed according to its terms: and this can be done only by allowing interest from the date when the appellant should have performed.

It is respectfully submitted that the District Court did not err in any of the particulars specified in appellant's brief, and that the decree ought to be affirmed.

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